

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

279

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,947

EMIL A. AUDETTE,

v.

DR. JOHN GREENWOOD,

Appellant,

v.

FULVIO ALVIANI,

*Third Party
Defendant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
CIVIL DIVISION

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 3 1971

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Greenwood*

(i)

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*Case chiefly relied upon.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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CIVIL DIVISION

BRIEF FOR APPELLANT

REFERENCE TO RULING

The appellant Greenwood refers to the ruling of the District Court as follows:

1. The order for final judgment entered on October 22, 1970 (App. 10).
2. The court reporters' transcript of the Judge's ruling and matters following (App. 12-14).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in denying relief to appellant Greenwood under his third party complaint for costs and attorney's fees incurred by him in defending the action for commissions brought by the plaintiff Audette.

This case was not previously before this court, but is probably consolidated with Appeal No. 24864.

STATEMENT OF THE CASE

As plaintiff, Emil Audette, a real estate broker, filed an action in the United States District Court for the District of Columbia, Civil Action No. 504-70, against Dr. John Greenwood, your appellant in this appeal, for a real estate commission in the amount of \$10,236.00, resulting from a sale in 1969 of the appellant's real property to Fulvio Alviani, your appellee in this appeal (App. 1).

The appellant Greenwood filed an answer thereto denying liability under the Complaint (App. 2) and filed a third party complaint against the appellee Alviani (App. 3) charging that appellee Alviani had, on October 31, 1969, agreed in writing to the effect that no broker procured the purchase and covenanted to indemnify and save the Greenwood harmless from all suits or judgments, including court costs and counsel fees to defend any such action brought by a broker and demanded judgment against Alviani for all sums that may be adjudged against Greenwood in favor of Audette and costs and attorney's fees for defending the action.

Alviani filed an answer to the third party complaint admitting the purchase and the indemnity agreement, but he denied liability to Greenwood on the grounds that the indemnity agreement did not apply to Alviani and that there had not been full disclosure by Greenwood to Alviani at the time of the execution of the agreement of purchase (App. 4-5).

Greenwood, after discovery had been completed, filed a motion for summary judgment against Audette (App. 6).

Alviani then filed a motion for summary judgment against Audette and Greenwood (App. 7).

The above motions were orally argued before the District Judge, who on October 22, 1970, ruled by final judgment that Greenwood's motion for summary judgment against Audette was granted and that Greenwood's claim for attorney's fees or court costs against Alviani under Greenwood's third party complaint was denied (App. 10-14).

On November 19, 1970, Greenwood noted an appeal to this Court (App. 25).

ARGUMENT

The trial judge, in his remarks at the time of the oral decision, in granting Greenwood's motion for summary judgment, declared Alviani's motion for summary judgment as moot, but then proceeded to deny Greenwood any relief against Alviani for costs and attorney's fees for defending the action (App. 10-14).

In effect, the trial judge by denying such relief, impliedly granted Alviani's motion for summary judgment or treated it as a motion for judgment on the pleadings, although there were issues of material fact between these parties and appellant Greenwood was therefore entitled to proceed to a trial on those issues. In such action the trial judge was clearly in error.

In Greenwood's third party complaint, Alviani was charged with having agreed in writing to the effect that no broker procured the purchase of the real property and having covenanted to indemnify and save Greenwood harmless from all suits or judgments, including court costs and counsel fees to defend any such action brought by a broker (App. 3-4).

In the answer of Alviani to the third party complaint (App. 5), Alviani admitted entering into such agreement but (1) denied it applied to him and (2) if it did apply to him was induced by a knowing misrepresentation by Greenwood.

At the time of the trial court's final ruling, the pleadings were at issue and discovery had been completed, the distillation of which was that the indemnity did apply to the third party complaint and there was no misrepresentation or wilful omission of any material fact by Greenwood.

The third party complaint charged liability of Alviani for any action for commission brought by "a broker" without qualifying whether he was the seller's or the buyer's broker. The documents themselves were not in the record before the trial court. Therefore, the allegations of the third party complaint could not be said to be inapplicable.

As to the defense of misrepresentation, the deposition of Alviani, which was taken a few weeks after that of the plaintiff broker Audette, shows on pages 12 through 16 (App. 15-18) that Alviani attached no important significance to the indemnity agreement. On page 14 of his deposition, Alviani in answer to the question:

"Q. You had some objection to signing this contract with that clause in it, didn't you?

"A. Well, it was purely--well, yes, maybe so, I had a little objection."

He further testified therein that Greenwood told him he had no commitments to Audette, and on page 14:

"Q. By what happened after Dr. Greenwood said to you if you don't want to sign the indemnity agreement clause then the price would be six percent more, what did you do?

"A. I analyzed the thing that if there is no commitment there is no danger for me at all because one I think is related to the other. . . ."

Nor did Alviani's defense include by allegation or testimony that he checked with Audette (whom he knew) to learn for himself whether Audette would make a claim for commission from this sale. Apparently, Alviani was willing to buy the property for a net price and take his chances on whether Audette would sue (App. 16-17).

The deposition of Greenwood is clear that no material facts were misrepresented or concealed from Alviani (App. 18 thru 24).

The validity or enforcement of an indemnity agreement is governed by the law of contracts. *Fidelity & Casualty Co. of New York v. J. A. Jones Construction Co.*, 325 F.2d 605 (1963).

To justify appellee's refusal to honor his indemnity agreement, he would have to prove that the appellant, as an inducement, concealed or misrepresented a material fact upon which appellee relied to his damage, and such fraud must be shown by clear and convincing evidence, which is not equivocal. *Public Motor Service v. Standard Oil Co. of New Jersey*, 69 App. D.C. 89, 99 F.2d 124 (1938); *Rudy v. Eagle Indemnity Co.*, 178 F.2d 94 (1949).

The record before the trial judge did not warrant a finding against Greenwood on his claim for fees and costs to defend Audette's action, since the deposition showed that there was no misrepresentation or concealment of material facts.

CONCLUSION

The appellant Greenwood requests that the judgment of the trial court, denying him the right to costs and counsel fees from Alviani, be reversed and that judgment be entered in his favor subject to proof of damages.

Respectfully submitted,

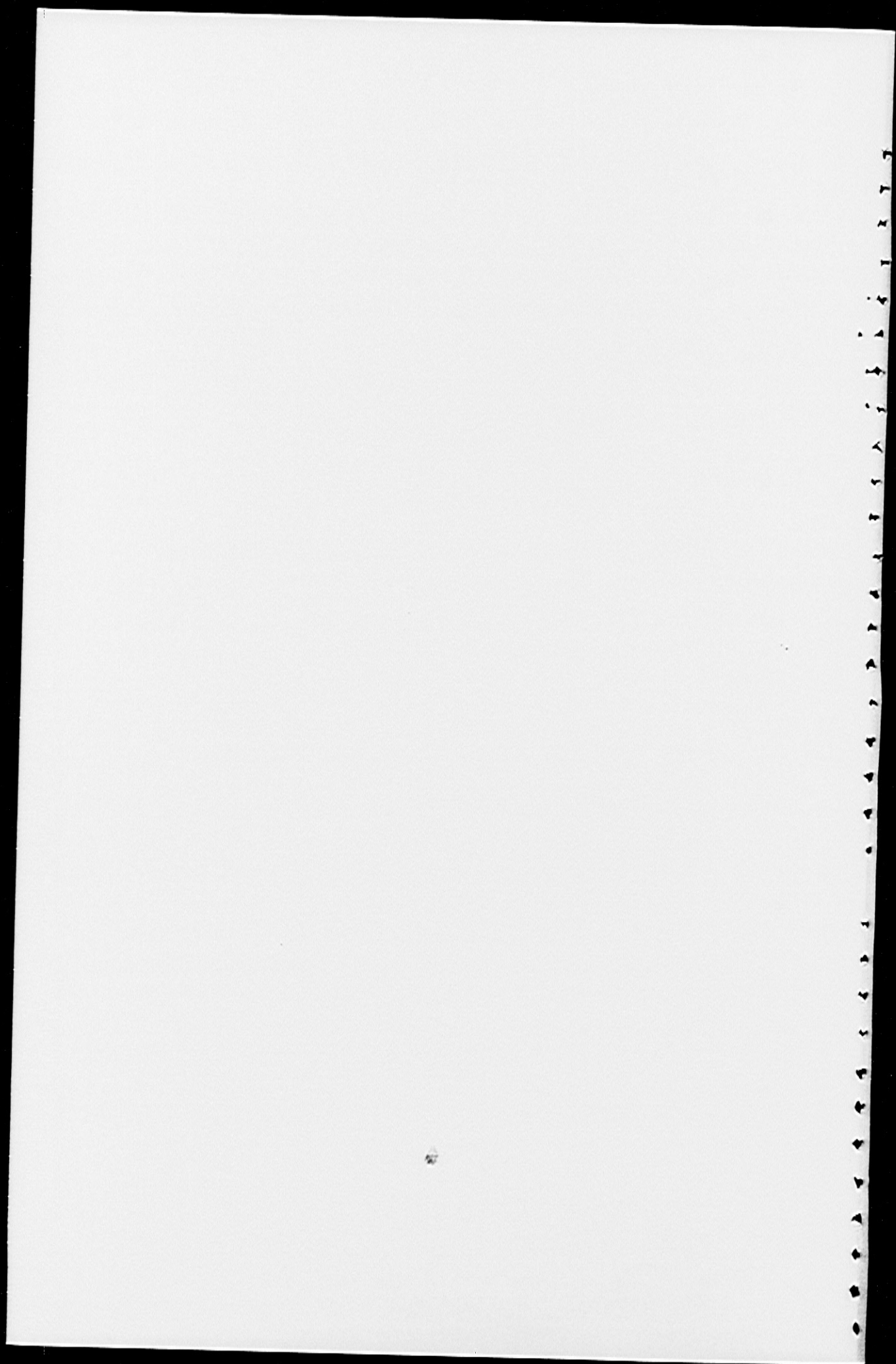
Morris D. Schwartz
1341 G Street, N.W.
Washington, D.C. 20005

*Attorney for Appellant
Greenwood*

(i)

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APPENDIX

EMIL A. AUDETTE
1212 Wisconsin Avenue, N.W.
Washington, D.C.

Plaintiff

v.

C.A. No. 504-70

DR. JOHN GREENWOOD
1212 Wisconsin Avenue, N.W.
Washington, D.C.

Defendant

COMPLAINT FOR REAL ESTATE COMMISSION

1. The plaintiff is a resident of the state of Maryland and a citizen of the United States, but is engaged in business in the District of Columbia, and the matters and things involved herein occurred in the District of Columbia.

The defendant, Dr. John Greenwood, is engaged in business in the District of Columbia, having his principal place of business therein. Defendant is, however, a resident of the state of Maryland.

The amount involved exceeds \$10,000.00.

2. On August 21, 1968, the plaintiff was employed by the defendant to sell the premises 1259 Wisconsin Avenue, N.W., in the District of Columbia. That the plaintiff at that time and at all times material, and at the present time, held and holds a real estate broker's license in the District of Columbia and is authorized to engage in that business in the District of Columbia. That he was employed to sell said property for a minimum price of \$170,600.00. That he accepted the employment and undertook the sale of said property.

3. That he introduced one Alviani, who traded in the District of Columbia as Dominique of Georgetown, to the

property, advised him that it was for sale, and interested the said Alviani in said property.

4. That the said Alviani was unable at that time to raise the purchase price, but entered into an arrangement with the defendant for the renting of said property, and he did rent the same. Thereafter during the month of November 1969, he completed his purchase of said property at the price of \$170,600.00 which was the list price, but the said defendant fails and refuses to pay the commission due on said sale although the same is lawfully due and payable.

5. That the plaintiff was the procuring cause of the sale and is entitled to the commission on said sale. That under the original contract the defendant had agreed to pay a commission of 6% of the sale price to the plaintiff as commission for said sale.

WHEREFORE plaintiff demands judgment in the sum of \$10,236.00 with interest from November 21, 1969, plus costs of this suit.

Mark P. Friedlander

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the allegations of the complaint, the defendant states that the three paragraphs of the first provision are admitted.

All the remaining allegations of the complaint, being paragraphs numbered 2, 3, 4 and 5, are denied, except to admit

App. 3

that on November 12, 1969, defendant did sell such property to Fulvio Alviani for the sum of \$170,600.00, but on terms other than all cash, and did not pay plaintiff a commission thereon.

WHEREFORE, defendant demands that this action be dismissed and defendant recover its costs.

Morris D. Schwartz
Attorney for Defendant
711 14th St., N.W.
Washington, D.C. 20005
RE 7-2190

THIRD PARTY COMPLAINT

1. Plaintiff Emil A. Audette has filed against the defendant Dr. John Greenwood a complaint, copy of which is attached hereto as "Exhibit A".

2. On or about October 31, 1969, the third party defendant Fulvio Alviani agreed in writing to the effect that no broker procured the purchase of the real property described in the complaint and covenanted to indemnify and save the defendant harmless from all suits or judgments, including court costs and counsel fees to defend any such action brought by a broker.

3. The third party defendant has refused to honor said agreement of indemnity.

WHEREFORE, defendant demands judgment against the third party defendant for (a) all sums that may be adjudged against defendant in favor of plaintiff, and (b) costs and attorneys' fees for defending this action.

Morris D. Schwartz
*Attorney for Defendant and
Third Party Plaintiff*
711 14th Street, N.W.
Washington, D.C. 20005
RE 7-2190

ANSWER OF THIRD-PARTY DEFENDANT
Defenses to Complaint

First Defense

Plaintiff's claim is based upon all alleged oral brokerage agreement between the Plaintiff and Defendant. Under D.C. Code 45-1408(n) and D.C. Code 28-3502, such agreements to be valid must be in writing. Any offering by a broker of realty for sale without such written consent is contrary to the provisions of these sections of the D.C. Code and enforcement of a claim based upon such an alleged oral agreement cannot, therefore, serve as a basis for recovery of the alleged brokerage commission.

Defenses to Third-Party Complaint

First Defense

1. The complaint fails to state a claim upon which relief might be granted.

Second Defense

2. Third-Party Defendant admits the allegations in paragraphs 1 and 3 of the Third-Party Complaint.

3. Third-Party Defendant admits that on or about October 31, 1969, he entered into a contract of sale with Third-Party Plaintiff, containing a provision which, by its terms, obligates the Third-Party Defendant to indemnify the Third-Party Plaintiff against suits brought against the said Third-Party Plaintiff by brokers employed by the Third-Party Defendant. Third-Party Defendant denies that the provision, by its terms, applies to brokers employed by the Third-Party Plaintiff and also denies the remaining allegations of paragraph 2 of the Third-Party Complaint.

Third Defense

4. Third-Party Defendant's agreement to the indemnification provision, if it does apply to suits brought by brokers employed by the Third-Party Plaintiff, was obtained in justifiable reliance upon the representations of the Third-Party Plaintiff that no brokerage agreement had been or was in existence either between the Plaintiff and the Third-Party Plaintiff or between the Third-Party Plaintiff and any other broker.

5. If such an agreement had been in existence prior to, or was in existence on, October 31, 1969, then such representations by the Third-Party Plaintiff would have been false, and would have been known by the Third-Party Plaintiff to be false and would have been made for the purpose of inducing the Third-Party Defendant to execute the indemnification provision of the contract of sale.

6. If the Third-Party Plaintiff had entered into a brokerage agreement for the sale of the realty in question prior to or on October 31, 1969, then his claim, brought under the terms of the indemnification provision, is barred by his misrepresentations as to this material fact.

7. Jury trial is demanded as to all issues raised herein.

STEPTOE AND JOHNSON

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant and third party plaintiff, John Greenwood, moves the Court for summary judgment against the plaintiff on the ground that the pleadings and depositions on file show that there is no genuine issue as to any material fact and that the defendant is entitled to such judgment as a matter of law.

Morris D. Schwartz
*Attorney for Defendant
and Third Party Plaintiff*
1341 G Street, N.W.,
Washington, D.C. 20005
RE 7-2190

DEFENDANT'S STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO DISPUTE

1. That plaintiff Audette, a licensed real estate broker, prepared a non-exclusive form of listing authorization for the sale of defendant Greenwood's property at 1259 Wisconsin Avenue, N.W., Washington, D.C. at a price of \$170,600.00 and Audette dated it August 21, 1968.
2. That Greenwood refused to sign such card and never did so.
3. That in September, 1968, the third party defendant Alviani, who had a shoe store in the same block, told Audette he was looking for a place to rent, and Audette pointed to Greenwood's building three doors away as "going to become available" and said that Greenwood wanted to sell it, but Alviani told Audette he did not have the money to buy but wanted a place to rent, and Audette said he had nothing for rent.
4. That through the intervention of a mutual friend, Albert Duryee, who operated a jewelry store in the same

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block, Alviani entered into a lease of the property from Greenwood in September, 1968, for five years, to commence January 1, 1969, at \$1,000.00 a month.

5. That in October, 1969, after the intervention of the same Duryee, as a "go-between" and after several persuasions by him, Alviani raised some money and entered into an agreement on October 31, 1969 to buy Greenwood's property for \$170,600.00.

6. That Audette did no more to procure Alviani as a purchaser of Greenwood's property than is set forth in para-3 above, and that he did not advertise the property, did not bring Alviani on to the premises and did not introduce him to Greenwood as a possible purchaser, and had been informed that Alviani did not desire to buy.

Morris D. Schwartz
*Attorney for Defendant
Greenwood*

THIRD PARTY DEFENDANT FULVIO ALVIANI'S
MOTION FOR SUMMARY JUDGMENT

Third party defendant moves this Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the third party defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the third party defendant is entitled to a judgment as a matter of law. In support of this motion, third party defendant refers this Court to the pleadings, to the depositions of plaintiff Emil Audette (D. Audette), defendant Dr. John Greenwood (D. Greenwood), third party defendant Fulvio Alviani (D. Alviani) and Mr. Albert Duryee (D. Duryee) on file in this case and to the following documents attached hereto and made a part hereof:

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(1) Statement of material facts as to which there is no genuine issue.

(2) Memorandum of Points and Authorities in support of defendant's motion for summary judgment.

/s/ STEPTOE & JOHNSON

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

Third party defendant Fulvio Alviani states that there is no genuine issue as to the following material facts:

1. Defendant did not execute a written listing with plaintiff or plaintiff's agents (hereinafter referred to collectively as "plaintiff") for the sale of the property at 1257-1259 Wisconsin Avenue, Washington, D.C. (D. Greenwood, pp. 6-7, 28, D. Audette, pp. 5-6, 20-21, 23-24).

2. Defendant refused, after request by plaintiff, to execute a written listing. (D. Audette, p. 6)

3. Third party defendant and defendant executed a rental agreement for the property described above, bearing the date of September, 1968, with the occupancy and rental payments to commence in January, 1969. (D. Alviani, pp. 8-9, D. Greenwood, p. 8)

4. Plaintiff's only contact with third party defendant relating to the sale of the property in question, and before the execution of rental agreement by defendant and third party defendant was executed, was in August, 1968. (D. Audette, p. 11)

5. Plaintiff never showed the third party defendant the interior of the property in question. (D. Audette, p. 12)

6. During the months of August and September, 1968, the third party defendant was not financially able to purchase the property in question. (D. Audette, pp. 9, 11, 12, D. Duryee, pp. 19-20)

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7. Third party defendant was not, until the fall of 1969, financially able to purchase the property in question. (D. Alviani, p. 10, D. Duryee, p. 13)

8. Plaintiff did not, prior to the execution of the rental agreement between defendant and third party defendant, inform the defendant that the third party defendant was a prospective purchaser. (D. Audette, p. 13)

9. After the execution of the rental agreement between defendant and third party defendant, plaintiff made no effort to sell the property in question to the third party defendant. (D. Audette, p. 10)

10. The contract of sale executed by defendant and third party defendant on October 31, 1969 was prepared by the defendant, or his attorney. (D. Greenwood, p. 10)

11. Defendant, prior to October 31, 1969, indicated to the third party defendant that plaintiff had not been employed by him as a broker. (D. Greenwood, p. 12)

12. Third party defendant in executing the contract of sale dated October 31, 1969 relied upon the defendant's representation that plaintiff had not been employed by the defendant to act as a broker with respect to the property in question. (D. Alviani, pp. 14-15)

/s/ STEPTOE & JOHNSON

DEFENDANT JOHN GREENWOOD'S STATEMENT
OF GENUINE ISSUES WITH RESPECT TO MOTION
OF THIRD PARTY DEFENDANT ALVIANI FOR
SUMMARY JUDGMENT AGAINST THE DEFEND-
ANT'S THIRD PARTY ACTION

1. Although admitting Alviani's Statement No. 11 to be true, defendant Greenwood contends that Alviani knew, at the time of signing the real estate purchase agreement on October 31, 1969, that the plaintiff (Audette) had claimed to have brought the parties together (D. Greenwood, pp. 12, 13).

2. Alviani, at that date, took the position that if Greenwood had not signed anything (meaning an authorization with Audette), Greenwood had no broker (D. Greenwood, pp. 13, 14).

3. Alviani knew all the facts and that if he would not agree to the indemnity provision of the purchase agreement, the sales price would be 6% higher (D. Greenwood, p. 14; D. Alviani, pp. 13, 14).

/s/ Morris D. Schwartz

ORDER

Upon consideration of the motions for summary judgment filed herein by the defendant, Dr. John Greenwood, and the third party defendant, Fulvio Alviani, and the pleadings, depositions and affidavits filed herein, and it appearing to the satisfaction of the Court that the plaintiff, Emil A. Audette, was not the procuring cause of the sale of the defendant's real estate to the third party defendant, and

that there is no material issue to be tried, it is by the Court this 22nd day of October, 1970,

ORDERED, that the motion of the defendant for summary judgment against the plaintiff be and it is hereby granted, and that the defendant's claim for attorney's fees or court costs against the third party defendant under the defendant's third party complaint is hereby denied. There being no just reason for delay, entry of final judgment is hereby directed.

John H. Pratt, JUDGE

EMIL A. AUDETTE,)
Plaintiff)

v.)

DR. JOHN GREENWOOD,)
Defendant and)
Third Party)
Plaintiff)

Civil Action No.
504-70

v.)

FULVIO ALVIANI,)
Third Party)
Defendant)

Washington, D.C.
Monday, October 19,
1970

The above-entitled cause came on for a hearing before
THE HONORABLE JOHN H. PRATT, United States Dis-
trict Judge, at 2 p.m.

APPEARANCES:

MARK P. FRIEDLANDER, ESQ.
For the Plaintiff Audette

MORRIS D. SCHWARTZ, ESQ.
For the Defendant and Plaintiff Greenwood

MICHAEL CAMPBELL, ESQ.
For the Defendant Alviani

[2] NOTE: Excerpt - Judge's Ruling and Matters Follow-
ing Only.

THE COURT: I am going to grant the motion of the
defendant Greenwood for summary judgment; deny the
plaintiff Audette's motion for summary judgment.

I don't think we have to pass on your motion, Mr. Campbell, since yours is moot as a result of Greenwood getting summary judgment.

I think it is clear from reading the depositions of all of the parties that the defendant Audette was not the procuring cause of this sale and while there could be other reasons that could be spelled out as to why he shouldn't recover, the failure of a proper listing, the lack of setting out the terms and conditions, and all of that type of thing, I think it is quite clear from reading the depositions that there is no genuine issue of material fact and that under the law the defendant Greenwood is entitled to recover.

You submit the order, Mr. Schwartz.

MR. SCHWARTZ: I take it, Your Honor, that would be a final judgment, under the rule?

THE COURT: That is right. You submit the order denying the motion.

MR. SCHWARTZ: What about the defendant's claim against the third party defendant?

THE COURT: Let me take a look at the pleadings again.

[3] MR. SCHWARTZ: I guess all that is left in this case would be attorneys' fees and I think perhaps Mr. Campbell and I can get together on that.

MR. FRIEDLANDER: I think you would probably want to wait until the Court of Appeals passes on that.

MR. SCHWARTZ: Yes, I understand that, but I wanted to get my part of the record straight to know where we go.

MR. FRIEDLANDER: Are you going to submit—
There will be a final judgment?

THE COURT: It will be a judgment denying your motion and granting defendant Greenwood's motion against the plaintiff.

MR. FRIEDLANDER: As a result of that, there would be a final judgment which we would appeal from.

THE COURT: That is right.

MR. FRIEDLANDER: So the order could be in one form, but conclude with the final judgment.

THE COURT: I would think so.

You are talking about a claim that the defendant made against the third party defendant.

MR. SCHWARTZ: Yes. There is a third party action which asks for indemnity of anything that may be adjudged paid to the plaintiff and then attorneys' fees and costs.

It may be that Mr. Campbell and I can get together on that aspect of that.

[4] THE COURT: I would think you could.

With respect to attorneys' fees, I think attorneys' fees will rest on the individuals.

MR. FRIEDLANDER: When the Court found there wasn't any basis for our claim, he wouldn't have any liability, would he?

THE COURT: I wouldn't think so.

MR. SCHWARTZ: Would Your Honor prefer that the order granting summary judgment to the defendant Greenwood state that Your Honor finds that Greenwood is not entitled to attorneys' fees from Alviani?

Is that what you are saying or is that matter still open for us to resolve?

THE COURT: Did you say attorneys' fees from Alviani?

MR. SCHWARTZ: Yes.

MR. CAMPBELL: Yes, Your Honor.

MR. SCHWARTZ: The indemnity clause which we made him a third party defendant says he will save us harmless from any suits by any broker, including court costs and attorneys' fees.

MR. CAMPBELL: We contested the applicability of that to this case, Your Honor, and raised the estoppel issue.

THE COURT: I wouldn't grant attorneys' fees or court costs on this basis. You can present the final order.

MR. SCHWARTZ: Very well, Your Honor.

[5] MR. FRIEDLANDER: Thank you.

(Whereupon, at 2:20 p.m., the hearing in the above-entitled cause was concluded.)

* * * * *

EXCERPTS FROM FULVIO ALVIANI'S DEPOSITION

[12] Q. And you gave Dr. Greenwood a deferred note for the difference? A. Yes.

Q. That note is still outstanding? A. Yes.

Q. And you are making payments? A. Yes.

Q. The contract to purchase Dr. Greenwood's property was signed in this office here, was it not? A. Yes.

Q. And I had prepared that contract, isn't that correct? A. Yes.

Q. Do you recall the circumstances in this office? A. Yes.

Q. Immediately prior to your signing the contract? A. Yes.

Q. Will you tell us what happened in the conversations between you and me and Dr. Greenwood? By the way, were we the only three in the room or was Mrs. Greenwood present? A. Mrs. Greenwood, yes. There were four of us in the room.

Q. Will you tell us the conversation and circumstances [13] surrounding the signing of that contract, what was said to each other? A. I asked you to explain to me the different points of the contract and I don't remember any major situation. I don't think there was anything special to remember.

Q. Do you recall that we talked about an indemnity clause in case of any broker making a claim? A. Yes, it is a part of the contract.

Q. Did we have a discussion about that? A. Yes, I think so.

Q. I show you this paper and ask you if this is the contract we are talking about? A. My signature is here and it must be.

Q. But this is the paper, the contract of purchase and sale? A. Yes.

Q. Didn't you ask me why, or ask me and Dr. Greenwood why there was that indemnity clause in the contract?

A. I asked you different questions. I tried to understand as much as I could the contract, yes, I am sure I did.

Q. You were explained by Dr. Greenwood why this clause was in here, weren't you? A. Yes.

[14] Q. You had some objection to signing this contract with that clause in it, didn't you? A. Well, it was purely—well yes, maybe so, I had a little objection.

Q. Didn't Dr. Greenwood say to you that if you did not want the indemnity clause in there that the purchase price would be six percent more? A. This was a matter that was brought up in his office, and Dr. Greenwood with a very nice smile on his face made the offer at this point. But I asked Dr. Greenwood on the street very clearly the question if he had any commitments with anyone, with Mr. Audette, if he had any commitments, written or oral or verbal, and Dr. Greenwood said no, he did not have any commitments.

Q. Where did you have this conversation? A. Right here.

Q. In this office? A. Yes.

Q. And Dr. Greenwood said what? A. And said that he had no commitments.

Q. By what happened after Dr. Greenwood said to you if you don't want to sign the indemnity clause then the price will be six percent more, what did you do? [15] A. I analyzed the thing that if there is no commitment there is no danger for me at all because one I think is related to the other.

I have no broker on my side. I will take for very good Dr. Greenwood's word that he has no written contract or verbal contract or commitments with anyone, so I would not worry about this clause, and I went ahead and signed the contract. I did not see any danger.

Q. Before you signed this contract, Mr. Alviani, didn't you go out to the reception room and use that telephone and call somebody? A. Yes.

Q. Whom did you call? A. My wife.

Q. You discussed this indemnity clause with her, didn't you? A. I discussed a couple of other things.

Q. But also the indemnity clause? A. I don't recall. Maybe I did that.

Q. After you finished that conversation, didn't you then come in and sign the contract? A. Yes.

Q. So that from the time that you spoke to Mr. Audette on the street in September of 1968 you had no further discussions [16] with Mr. Audette about the purchase of this building, is that correct? A. Not about the building, no.

Q. Did you have any conversations pertaining to your lease? A. There was another store for rent down the street and I was thinking of putting in a men's shoe shop, and he was the one in care of renting the place, and I called him and asked him questions about that location there. There was nothing said about 1259 Wisconsin Avenue.

Q. At any time after you signed the lease or at any time between September of 1968 and the date the suit was filed by Mr. Audette against Dr. Greenwood, did you ever tell Mr. Audette the terms of your lease, how much it was? A. No.

Q. Did he ever ask you? A. No, I am sorry not at all.

MR. SCHWARTZ: I have no other questions.

MR. CAMPBELL: I have no questions.

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. FRIEDLANDER:

Q. I want to ask a few questions. Did Mr. Audette participate at all in the renting of the premises? [17] A. Would you please put the question again?

Q. Did Mr. Audette participate at all in the renting of the place? A. Not for what concerns me.

Q. When you say not what concerns me, did he participate at all in the renting of the place, irrespective of who he was representing? A. Not that I know, sir.

Q. Did you ever see him during the period of negotiations? A. No, except one time I asked him if he had anything for rent and he said no.

Q. You are speaking of the first time? A. Yes.

Q. Did he then point out the place of Dr. Greenwood and say that that was for sale? A. Yes.

Q. Did you ever say a word to him about that place after that? A. No.

Q. Not a word was said? A. Never.

Q. Did you ever talk to Mr. Audette about anything

* * *

* * * * *

EXCERPTS FROM JOHN GREENWOOD'S
DEPOSITION

[8] Q. I take it from the answers to previous questions then that you did not hire Mr. Audette or his agency as a broker, is that correct? A. That is correct.

Q. And that Mr. Audette and his agency did not advertise your property for sale? A. Not to my knowledge.

Q. Did Mr. Audette or anyone from his agency bring anyone in to see you as a prospective buyer of your property? A. No.

Q. Did Mr. Audette or anyone in his agency show the property to anyone who might have been a prospective buyer? A. No, not to my knowledge.

Q. When was the date that the lease was signed between you and Mr. Alviani? A. Sometime in September of 1968.

Q. After you signed the lease or after both of you signed the lease, did Mr. Audette approach you or did a member of his office approach you and make a claim against you for a commission? A. No, but Mr. Audette in December of 1968 said to me that he had sent Mr. Alviani to me.

Q. Did he say anything else? [9] A. He was very antagonistic and very different from the way I used to know him.

Q. Did he mention anything that you should pay him some money? A. No.

Q. Mr. Audette stated in his deposition that when he made a demand for a commission for the rental that you replied that you had listed the property for sale and not for rental? Is that what you told him that day? A. I never listed the property at any time.

Q. So you could not have told him then that you had listed the property for sale and not for rental? A. That is correct, I did not list the property for sale.

Q. In respect to Mr. Alviani, did you and Mr. Alviani ever discuss the prospect of his purchasing the property at 1259 Wisconsin Avenue before he signed the rental agreement with you? A. I cannot recall.

Q. You don't know one way or the other? A. No.

Q. Would you be able to tell us when might have been the first time that you and Mr. Alviani discussed the [10] possibility of his buying your property at 1259 Wisconsin Avenue? A. In the fall of 1969.

Q. You state that is the first time that you and Mr. Alviani discussed his buying your property, is that correct? A. He may have mentioned to me earlier that he is only interested in renting the property.

Q. The contract of sale whereby you sold the property to Mr. Alviani, who drew up that contract of sale? A. Mr. Morris Schwartz.

Q. Was Mr. Alviani represented by a lawyer the day that all of you gathered in here and signed the contract of sale?

A. He was not represented in this office. The lawyer was not present, but Mr. Alviani left the room to make a phone call concerning a specific question that he had and at the time I did not know who he called.

Q. From what Mr. Alviani has said earlier this afternoon, it appears that the contract was at least in part explained to him, is that correct? A. It was explained to him in full, in detail. And Mr. Alviani raised questions and they were explained to him.

Q. Both you and Mr. Schwartz explained to him the meaning of the contract? A. Mr. Schwartz did the explaining.

[11] Q. Primarily Mr. Schwartz? A. Yes.

Q. The indemnity provision in the contract, did you explain that to Mr. Alviani or did Mr. Schwartz or did both of you explain it to Mr. Alviani? A. Mr. Schwartz explained it and I said if you have any doubts about this or hesitation about this, then the cost would be six percent higher.

Q. When you spoke about the indemnity provision did Mr. Alviani ask you if you had employed any broker to sell the property at 1259 Wisconsin Avenue? A. I had told him that Mr. Audette had in great anger represented to me at a later date, claiming that Mr. Audette sent Mr. Alviani to me, and I explained to him that from this reaction Mr. Audette's attitude was self evident.

Q. Did you tell Mr. Alviani though that you had not hired Mr. Audette as a broker? A. I explained to him that at a later date when Mr. Borden asked me repeatedly to sign this, some authorization to give him a listing which I refused to give him, that he asked me or Mr. Audette asked me at the time if he procured a customer for this building if I would be willing to pay the commission.

[12] This was several weeks after I moved into my office, around Christmas or a week thereafter of 1968.

Q. You stated that Mr. Audette asked you if you procured a purchaser would you pay him a commission. What was your answer to that question? A. My answer to that question was if I decided to sell and if I decide to engage him and if he procured a contract and if I decide to accept the contract, I will pay the customary commission, but I did not engage him to do so.

Q. Did you tell him at that time you were not engaging him to act as your broker? A. The building was not for sale at that time.

Q. This is after you had signed the lease with Mr. Alviani, is that correct? A. That is correct, several months after.

Q. All of this discussion between you and Mr. Audette and what he said to you and what you said to him is what you told Mr. Alviani on October 31, 1969 before he signed the contract? A. He knew that Mr. Audette had made the statement to me claiming to have put us together.

Q. Did he know what your answer was?

MR. SCHWARTZ: Mr. Alviani?

[13] BY MR. CAMPBELL:

Q. To your knowledge, did Mr. Alviani know what your answer to Mr. Audette had been? A. That I don't know.

Q. You had not told Mr. Alviani what you had told Mr. Audette? A. Mr. Alviani knew very clearly that Mr. Audette had a conversation with me several months after Mr. Alviani was a tenant of mine.

Q. But that doesn't go quite far enough. Did Mr. Alviani on the date that you signed the contract of sale ask you if Mr. Audette was your broker? A. He was not my broker.

Q. Did Mr. Alviani ask you that question? A. Not in this exact terminology.

Q. Did he ask you in language similar to that? A. He knew that Mr. Audette was claiming to have put us together.

Q. On the day that the contract of sale was signed, did Mr. Alviani ask you one last time if Mr. Audette had been hired by you as a broker? A. I remember he kept on repeating one statement to me repeatedly, that if you did not sign anything he is not your [14] broker.

Q. What did you say? A. I said you know what the facts are and if you do not wish to sign this then the price would be six percent higher.

Q. You stated that Mr. Alviani knew what the facts were? A. Yes.

Q. By that does that mean he knew both sides of the contract between you and Mr. Audette? Did he know what you told Mr. Audette? A. He knew that Mr. Audette claimed to have put the two of us together.

Q. Did you ever tell Mr. Alviani that you had rejected Mr. Audette's attempt to act as your broker? A. You see the question of timing is what is significant here because what you are asking me—

MR. FRIEDLANDER: I think you ought to tell your client to answer the question. I don't think he ought to evade the question.

MR. SCHWARTZ: Repeat the question.

(Question read.)

MR. SCHWARTZ: You can answer the question yes or no.

THE WITNESS: I never looked upon him as my broker.

[15] BY MR. CAMPBELL:

Q. Answer the question though, what you told Mr. Alviani?

MR. SCHWARTZ: He is not asking you what you thought about Mr. Audette. He is asking you what you told Mr. Alviani about Mr. Audette.

THE WITNESS: I don't remember the exact words, but we were all here in the office.

BY MR. CAMPBELL:

Q. What generally did you say? A. That Mr. Audette had a total change in attitude toward me and even though I was his next door neighbor he treated me entirely differently than he used to.

Q. We have been through that before. We know that you told Mr. Alviani that Mr. Audette was making a claim against you, but you still have not answered the question as to whether or not you said in this room or at any other time that you had rejected Mr. Audette's attempt to act as your broker? A. I did not say that.

MR. FRIEDLANDER: He said he really did not know.

THE WITNESS: He asked me to sign and give him a listing and I refused.

BY MR. CAMPBELL:

Q. Did you tell Mr. Alviani that you had refused? [16]
A. I do not recall.

MR. CAMPBELL: I have no further questions.

MR. FRIEDLANDER: Do you have any?

EXAMINATION BY COUNSEL FOR THE DEFENDANT
AND THIRD-PARTY PLAINTIFF

BY MR. SCHWARTZ:

Q. Dr. Greenwood, when did Mr. Audette first ask you or Mr. Borden first ask you to sign a document referred to as a listing card or authorization that he had prepared? A. Mr. Audette never asked me. Mr. Borden asked me on sev-

eral occasions to let him sell my building, and this was in December of 1968.

Q. Did he ever hand you a piece of paper and ask you to sign it? A. I did not see anything, but he may have had something in his hand, but I did not read it or did not see it and I was not ready to sell the building.

MR. SCHWARTZ: That is all.

EXAMINATION BY COUNSEL FOR THE PLAINTIFF
BY MR. FRIEDLANDER:

Q. What was the change in attitude you mentioned, from what to what? I am speaking of Mr. Audette's change of attitude? A. I once met Mr. Audette in the hall of our building and he was very abrupt and there was an incident at the back of

* * * * *

[35] to brokers employed by him. Was there any conversation about that at the time you had this meeting? A. I don't understand.

Q. As far as the indemnification agreement was concerned, it was read the way it is now and that is what everybody agreed upon? A. That is correct.

Q. Did Mr. Alviani say he did not understand it? A. He understood it very well. He did not say that.

Q. Would you answer the question? A. He did not say that.

MR. FRIEDLANDER: I have nothing further.

FURTHER EXAMINATION BY COUNSEL FOR THE
DEFENDANT AND THIRD-PARTY PLAINTIFF

BY MR. SCHWARTZ:

Q. Dr. Greenwood, after September of 1968, did Mr. Audette ever question you about the terms of the lease between you and Mr. Alviani? A. No, he did not.

MR. SCHWARTZ: That is all.

FURTHER EXAMINATION BY COUNSEL FOR
THE THIRD-PARTY DEFENDANT

BY MR. CAMPBELL:

Q. Just one more question. Going back to your conversation with Mr. Audette in December of 1968 when you told Mr. [36] Audette that if you ever decided to sell the property and if you were able to find a buyer at a certain price and if you agreed to the contract then you would hire him as a broker? A. I did not say I would hire him as a broker. If I decided to sell and he produces a contract and if the contract is acceptable to me and if I accepted it and he brings a contract to me, this conversation took place several months after Mr. Alviani was there.

Q. Was Mr. Alviani aware of this conversation, what was said in that conversation? A. Yes, he was aware that there was a contact between Mr. Audette and myself.

Q. Was he aware of what was said in this conversation? A. I don't know exactly.

Q. Did you make any representations or did you ever tell him what was said in this conversation?

MR. SCHWARTZ: What is the date of the conversation?

MR. CAMPBELL: I believe he refers to December of 1968.

THE WITNESS: That is correct. I don't recall exactly.

MR. CAMPBELL: That is all I have.

MR. SCHWARTZ: Do you wish to read it before you sign it?

THE WITNESS: Yes.

EMIL A. AUDETTE

Plaintiff

v.

DR. JOHN GREENWOOD

Defendant and
Third Party
Plaintiff

Civil No. 504-70

v.

FULVIO ALVIANI

Third Party
Defendant

NOTICE OF APPEAL

Notice is hereby given this 19th day of November, 1970, that Dr. John Greenwood, the defendant and third party plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of October, 1970 in favor of Fulvio Alviani, third party defendant herein, against said Dr. John Greenwood.

Morris D. Schwartz
*Attorney for Dr. John
Greenwood, Defendant-
Third Party Plaintiff,
Appellant*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 24,947

EMIL A. AUDETTE,

v.

DR. JOHN GREENWOOD,

Appellant.

v.

FULVIO ALVIANI,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRIEF FOR APPELLEE

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 5 1971

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IN THE
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Appeal No. 24,947

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Columbia, in an action for indemnification. The order denied third party plaintiff's (Greenwood) claim for attorney's fees and court costs in defending a suit for brokerage commission brought by the plaintiff (Audette).

The gravamen of Greenwood's complaint was that third party defendant (Alviani) was obligated by an October 31, 1969 contract of sale to indemnify Greenwood in the cause of action brought against Greenwood by Audette (App. 3). Alviani's answer denied such liability on the grounds that the complaint failed to state a claim, that the indemnity undertaking did not apply to Audette's cause of action, and that Greenwood was estopped from asserting the indemnity provision in this cause of action.

After discovery had been completed, Greenwood moved for summary judgment against Audette and Alviani moved for summary judgment against Greenwood and Audette. On October 22, 1970, after oral argument, Judge Pratt of the District Court granted Greenwood's motion against Audette and denied Greenwood's claim for attorney's fees and court costs (App. 10-14). On November 19, 1970 Greenwood noted an appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the indemnity undertaking in the October 31, 1969 contract of sale between Greenwood and Alviani applied to the cause of action brought by Audette.
2. Whether Greenwood is estopped from asserting a right of indemnification from Alviani with respect to the cause of action brought by Audette.
3. Whether Greenwood's complaint fails to state a cause of action for indemnity.
4. Whether the District Court erred in denying Greenwood's claim for attorney's fees and court costs in connection with the cause of action brought by Audette.

COUNTERSTATEMENT OF THE FACTS

In September, 1968 Alviani entered into a five-year rental agreement with Greenwood for real property, the later transfer of which is the issue in this appeal. As Alviani's business significantly improved during the first year of the lease, he considered purchasing the property in question. Several months before the sale was accomplished Greenwood and Alviani, both directly and through a disinterested third party Albert Duryee, began negotiations.

On October 31, 1969 these negotiations were completed and, in the office of Greenwood's attorney, the parties executed the contract of sale. This contract contained certain provisions which were drafted by Greenwood's attorney and appended to a standard form contract of sale. Included in these provisions was an indemnity undertaking which is the issue in this appeal.

Alviani was not represented by counsel either during the negotiations or at the time of the execution of the October 31, 1969 contract of sale.

After Alviani took possession of the real property, suit was brought against Greenwood by Audette who alleged that he had been employed by Greenwood as a broker and that he had procured the sale in question. The suit was for the brokerage commission allegedly earned. Greenwood filed a third party complaint against Alviani alleging a right of indemnification. Alviani answered the complaint (App. 4-5) stating Greenwood's complaint failed to state a claim, that the indemnity provision had no application to a suit brought by a broker allegedly employed by Greenwood and that Greenwood's representations as to Audette's relationship to him, made during the negotiations and at the time of sale, estopped Greenwood from asserting a right of indemnification with respect to Audette's suit.

Alviani filed a motion for summary judgment against Greenwood. During oral argument on that motion and a motion made by Greenwood in the original action brought by Audette, the District Court, after granting Greenwood's motion for summary judgment against Audette, denied Greenwood's claim for court costs and attorney's fees. While the District Court first treated Alviani's motion as moot, after its ruling on Greenwood's motion against Audette, and at the request of Greenwood's counsel (App. 13), the court reviewed the pleadings and the related papers. After this review the court denied Greenwood's claim against Alviani (App. 14) without specifically delineating which contention or contentions of Alviani it was relying upon.

**I. THE INDEMNITY PROVISION IN THE OCTOBER 31,
1969 CONTRACT OF SALE IS NOT APPLICABLE TO
AUDETTE'S CLAIM**

On October 31, 1969 the parties executed a contract of sale which contained the following:

Purchaser represents that no broker procured this purchase and *therefore* covenants to indemnify the sellers against and save them harmless from any and all suits, demands, actions or judgments which may be instituted or presented against them, or either of them, including court costs and counsel fees to defend or settle the same, by any broker for commission on this sale. [Emphasis Added]

The terms of this provision are critical to Greenwood's case and yet Greenwood's brief implies that the District Court could not consider the language of the provision as it was not "in the record." The provision was quoted in its entirety in the Memorandum of Points and Authorities in Support of Third Party Defendant's Motion for Summary Judgment. The motion itself was, of course, in

the record and that motion requests that the Court incorporate by reference the supporting memorandum. Even were this request for incorporation by reference not sufficient to satisfy local Rule 9(c) of the District Court, the indemnity provision, as it was quoted in its entirety during oral argument, was properly before the Court and properly considered by the Court in ruling on Alviani's Motion for Summary Judgment.¹

The terms of this indemnification provision clearly show that the undertaking of Alviani was premised upon his being able to represent that no broker procured this sale. If the broker bringing suit claimed to have been a broker employed by Alviani, then this clause would clearly provide for the indemnification of Greenwood. Other than such brokers, Alviani would have no way of knowing who was "a broker" and who was not and could not be expected to represent that no broker employed by Greenwood procured the sale. Only Greenwood would know who was or was not his broker.

The prefatory language, the first ten words of the provision, makes clear the conditions under which Alviani was assuming the indemnity undertaking. These words so limit that indemnity undertaking as to render it inapplicable to Greenwood's claim. In determining the meaning of this provision, Alviani, as the indemnitor, is entitled to have his undertaking strictly construed especially where the contract has been prepared by the indemnitee.² As this provision was prepared by Greenwood, or his agent, any construction of

¹*Creel v. Lone Star Defense Corp.*, 171 F. 2d 964, 967 (5th Cir. 1949), reversed on other grounds 339 U.S. 497 (1950); *Hiern v. St. Paul - Mercury Indemnity Company*, 262 F. 2d 526, 529 (5th Cir. 1959); *Snyder v. Dravo Corp.* 6 F.R.D. 546 (W.D. Penn. 1947).

²See 42 C.J.S. Indemnity § 8(b); Cf. *Haliburton Oil Well Cementing Co. v. Paulk*, 180 F.2d 79 (5th Cir. 1950), cert. den. 340 U.S. 812 (1950); *Lane v. Celanese Corp. of America*, 94 F. Supp. 528 (N.D.N.Y. 1951)

that provision which is to be made, should be made in favor of Alviani.³ These are standard rules of construction which, when taken together with the language used in the provision, indicate that Greenwood's claim that this provision pertains to a suit brought by a broker allegedly employed by him cannot be sustained.

As it is uncontested that Greenwood is the alleged indemnitee and that the provision was drafted by Greenwood's attorney, there is clearly no issue of fact with respect to this contention of Alviani.

The order of the District Court should, therefore, be sustained on the ground that the District Court, to have applied this indemnity provision, would first be required to determine its applicability to Audette's cause of action. To make this determination, it would have followed the general rules of contract construction and would have concluded that the provision was, as a matter of law⁴, insufficient to support Greenwood's third party claim.

II. GREENWOOD IS ESTOPPED FROM ASSERTING A RIGHT UNDER THE INDEMNITY PROVISION

With respect to the underlying cause of action brought by Audette against Greenwood, for which indemnification is sought, Alviani has contended that Greenwood is estopped from applying that provision of the contract to Audette's cause of action.

To establish estoppel in this jurisdiction Alviani must establish three principle elements; (a) representation as to a material fact, (b)

³*Cowal v. Hopkins*, 229 A. 2d 452 (D.C. Mun. App. 1967); *Simpson Bros. v. District of Columbia*, 73 F. Supp. 858 (D.D.C. 1947), aff. 179 F. 2d 430, cert. den. 338 U.S. 911 (1950)

⁴See *McReynolds v. Mortgage & Acceptance Corp.*, 56 U.S. App. D.C. 342, 13 F. 2d 313 (1926); *Arsenault v. Angle*, 43 A. 2d 709 (D.C. Mun. App. 1945)

his reliance thereon and (c) to his detriment.⁵ As stated in *Harrison v. Shirlington Trust Co.*, 148 A.2d 88 (D.C. Mun. App. 1959),

“a party is estopped to deny or assert the contrary of any material fact which by his words or conduct has induced another to act in such a manner as to change the latter’s position prejudicially.”

In *Goodman v. Dicker*, 83 U.S. App. D.C. 353, 169 F. 2d 684 (1948) the court reviewed a judgment for Dicker. The lower court had found that Goodman had represented to Dicker that the latter would be granted a franchise. In reliance thereon Dicker incurred expenses in preparation for opening the franchise. When Dicker was not awarded the franchise, he sued Goodman for breach of contract. The lower court granted relief, estopping Goodman from denying the existence of the contract. The U.S. Court of Appeals affirmed stating:

“Justice and fair dealing require that one who acts to his detriment on the faith of conduct of the kind revealed here should be protected by estopping the party who has brought about the situation from alleging anything in opposition to the natural consequences of his own course of conduct.”

The testimony of Greenwood during his deposition makes it clear that during the negotiations for the sale of the property in question and at the closing of the sale he represented to Alviani that Audette was not his broker and clearly implied that Audette’s claim was completely without merit (App. 20-22). These representations related to the potentiality of liability to another party and were, therefore, a material fact. As Greenwood has admitted making such a representation in his Statement of Genuine Issues (App. 10) this first element of estoppel is not in issue.

⁵*Parker v. Sager*, 85 U.S. App. D.C. 4, 174 F. 2d 657 (1949)

Alviani quite clearly attached a great deal of significance to and reliance upon these representations. While appellant now contends to the contrary and cites this court to testimony of Alviani, Greenwood conveniently omits the most relevant part of Alviani's testimony. To Alviani's testimony, quoted on the bottom of page 4 of Greenwood's brief, should be added:

"I have no broker on my side. I will take for very good Dr. Greenwood's word that he has no written contract or verbal contract or commitments with anyone, so I would not worry about this clause, and I went ahead and signed the contract. I did not see any danger." (App. 16)

Alviani had the right to rely upon the representation of Greenwood without investigating any further.⁶ As Greenwood represented to Alviani and the latter, as a result thereof, was led to believe that Audette was not a broker of Greenwood and that his claim was totally without merit and as both parties based their actions at the closing on that assumption, Greenwood was and is estopped from asserting a right to invoke the indemnity provision with respect to Audette's cause of action.⁷ The court could properly have found on the basis of all the depositions and Greenwood's failure to specifically deny that Alviani relied upon the admitted representations that there was no genuine issue of fact as to this second element of estoppel.

⁶Alviani alleged that such reliance had been established in his Statement of Material Facts As To Which There Is No Genuine Issue (App. 8-9) and Greenwood did not in his Statement of Genuine Issues deny that Alviani has so relied (App. 10).

⁷See *Carroll v. National Surety Co.*, 58 U.S. App. D.C. 3, 24 F. 2d 268 (1928); 42 C.J.S. Indemnity § 18

As it cannot reasonably be disputed by Greenwood that if the indemnity provision is applied to this cause of action it would operate to the prejudice of Alviani, the third element of estoppel is also present in this case.

The testimony of both parties establish that representations as to lack of merit in Audette's claim were made by Greenwood, that Alviani relied upon these representations in agreeing to the indemnity provision in the contract of sale and that, if enforced, the indemnity provision would clearly operate to his detriment. All elements of estoppel are present.

As there is no genuine factual issue remaining with respect to these elements of estoppel, the District Court could properly have granted Alviani's Motion for Summary Judgment.⁸

III. APPELLANT'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION

While the Federal Rules of Civil Procedure allow for liberalized pleading practice, there are certain basic requirements to stating a claim for indemnification. Where, as in this case, the claim for indemnification is based upon a contract, then the local requirements for pleading the existence of a contract must be satisfied.⁹ One of those requirements in the District of Columbia is the allegation that the contract is based upon consideration.¹⁰ Nothing in the third party complaint or Audette's complaint and Greenwood's answer, both appended to Greenwood's Third Party Complaint refer to any

⁸See *Dewey v. Clark*, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950)

⁹See *Knox v. First Security Bank of Utah*, 196 F.2d 112 (10 Cir. 1952); *Luckett v. Cohen*, 145 F. Supp. 155 (S.D.N.Y. 1956)

¹⁰*Parish v. Craig*, 40 U.S. App. D.C. 138 (1913), cert. den. 231 U.S. 754 (1913)

consideration for the October 31, 1969 agreement. Greenwood's failure to allege the existence of any consideration for the contract of sale makes it a fatally defective pleading as a matter of law. As it is fatally defective, this is an independent ground for sustaining the decision of the District Court,¹¹ especially if, as appellant indicates, the District Court's ruling is viewed as a judgment on the pleadings.¹²

CONCLUSION

The decision of the District Court, whether it be viewed as the grant of Alviani's Motion for Summary Judgment or as a Judgment on the Pleadings, can be sustained on any one of several grounds advanced by appellee.

If it be viewed as a judgment on the pleadings, Greenwood's failure to allege consideration for the indemnity provision clearly warrants judgment for Alviani.

If the District Court's order be viewed as the grant of Alviani's Motion for Summary Judgment, it may properly be sustained either on the ground that Greenwood is estopped to assert the indemnity provision or that the indemnity provision is inapplicable.

As to the latter, the language of the provision and the general rules of construction of contracts are not in dispute. As to the former, the depositions of both parties and the documents filed in support of and in opposition to Alviani's Motion for Summary Judgment establish all the elements of estoppel.

¹¹*Marranzano v. Riggs National Bank*, 87 U.S. App. D.C. 195, 184 F. 2d 349 (1950)

¹²2A Moore's, Federal Practice § 12.15

The judgment below should accordingly be affirmed.

Respectfully submitted,

/s/ John E. Nolan

/s/ Michael D. Campbell

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